PERWIRA HABIB BANK (M) BHD.

v.

MET SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. C23-3788-86]
2 JULY 1988

CONTRACT: *Term loan facility - Overdraft facility - Guarantee as security for the two facilities - Whether past consideration.*

On 22 August 1984, the plaintiffs approved the 1st defendant's application for a term loan facility of RM1.2 million and an overdraft facility of RM800,000. On 4 September 1984 the 2nd, 3rd and 4th defendants executed a guarantee in favour of the plaintiff to the limit of RM2 million. The guarantee expressly stated the consideration as "being one of making or continuing advances or otherwise giving or continuing credit or banking facility". The first draw down on the term loan facility occured on 7 September 1984 whilst the overdraft facility had been extended to the 1st defendant before the guarantee was signed. The 2nd, 3rd and 4th defendants appealed against the Senior Assistant Registrar's decision giving judgment in favour of the plaintiffs, on the ground that the guarantee was for a past consideration and was thus invalid in law.

Held:

[1] That in respect of the term loan facility as the first drawdown had taken place after the guarantee was signed the issue of past consideration did not arise.

[2] That in respect of the overdraft facility reading the guarantee in its entirely, it was apparent that it contained expressions wide enough to exclude the operation of any past consideration.

[3] There was therefore no merit to the 2nd, 3rd and 4th defendants' appeal and the appeal is dismissed with costs.

For the defendant/appellants - Alex Anthony; M/s. Alex R. Anthony & Associates
For the plaintiffs/respondents - S.M. Yoong; M/s. Shook Lin & Bok

JUDGMENT

Siti Norma Yaakob J:

The only objection taken by the defendants in the appeal before me was that the guarantee dated 4 September 1984 and signed by the 2nd - 4th defendants was for a past considerations and as such the guarantee is invalid in law.

On 22 August 1984, the plaintiffs approved the 1st defendant's application for a term loan of RM1.2 million and an overdraft for RM800,000 for a period of 10 years. The interest payable on both facilities was 3% above the plaintiff's base lending rate (BLR) per annum with monthly rests and in addition a penalty interest at 6% above the BLR was also imposed on excesses over the overdraft limit. At the material time, the plaintiffs' BLR was 11.25%.

One of the securities to be provided by the 1st defendant for these 2 loans was that the 2nd, 3rd and 4th defendants shall personally guarantee repayment of the loans to the plaintiffs to the limit of RM2 million and accordingly on 4 September 1984, they executed a guarantee

wherein they undertook to repay within 2 days after demand all moneys which shall, at any time be due, to the plaintiffs from the 1st defendant to the limit of RM2 million.

Taking the 2 loans separately, I shall now consider whether the guarantee has provided any consideration for such loans.

From the plaintiffs' statement of account which has been exhibited, the first draw down of the term loan amounting to RM900,000 was made by the plaintiffs on 7 September 1984. Since this took place after the guarantee was signed on 4 September 1984, the issue of part consideration does not arise as far as the term loan account was concerned.

As for the overdraft, it is not disputed that the plaintiffs had extended such facilities to the 1st defendant before the guarantee was signed as the 1st defendant had been a customer of the plaintiffs and there was this continuing relationship of banker and client between them. The guarantee that was signed after the facility was granted also speaks of that continuing relationship as the consideration for the overdraft and expressed as "being one of making or continuing advances or otherwise giving or continuing credit or banking facility" and for such facility, the 2nd - 4th defendants guaranteed repayment "of all moneys which shall, at any time be due" to the plaintiffs to the limit of RM2 million.

Reading the guarantee in its entirely, it is apparent that it contains expressions wide enough to exclude the operation of any past consideration coming into effect as to render it void and unenforceable. A guarantee like any other contract must be construed reasonably and this can be gauged not only by the words used but also with regard to the surrounding circumstances.

As there was no dispute on the 1st defendant's liability as the principal debtor and as there was also no submission on the other objections raised in the defendant's affidavit, I had considered that there was no merit to their appeal and I accordingly confirmed the order of the Senior Assistant Registrar and dismissed the appeal with costs.

Also found at [1988] 2 CLJ 480